

IN THE SUPREME COURT OF CANADA. —

FACTUM OF HUDSON'S BAY COMPANY AND CASE BY W. STUART EDWARDS



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In the Supreme Court of Canada

IN THE MATTER OF A REFERENCE AS TO THE POWER
OF THE PARLIAMENT OF CANADA AND OF THE
GOVERNMENT OF CANADA WITH RESPECT TO PRE-
CIOUS METALS IN, UNDER OR UPON CERTAIN LANDS
OF THE HUDSON'S BAY COMPANY, AND AS TO THE
OWNERSHIP OF SUCH PRECIOUS METALS.

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FACTUM OF HUDSON'S BAY COMPANY

INTRODUCTION

10 This is a reference to the Court by the Governor-in-Council under section 60 of The Supreme Court Act, relating to the ownership of the precious metals in certain lands of the Hudson's Bay Company, and it, under the order of Honourable Mr. Justice Mignault of the 20th of February, 1926, (Case, p. 52) files this factum.

The Order-in-Council P.C. 108 of the 26th of January, 1926, (Case, p. 2), and the schedules thereto concisely state the facts.

CHARTER OF COMPANY AND GRANT OF PRECIOUS METALS

By Letters Patent of 2nd of May, 1670, King Charles II incorporated the Company and granted to it the precious metals in the lands in question (Case, pp. 6-17). The first recital refers to the expedition undertaken by the incorporators of the Company "for finding some trade for furs, minerals and other considerable commodities" (Case, p. 6, l. 33). The grant in part reads as follows: "Now Know Ye, that We being desirous to promote all Endeavours tending to the publick Good of our People, and to encourage the said Undertaking, Have of Our Special Grace, certain Knowledge, and mere Motion, given, granted, ratified and confirmed, and by these presents for Us, Our Heirs and Successors, do give, grant, ratify and
30 confirm unto our said Cousin Prince Rupert, Christopher, Duke of Albemarle, William, Earle of Craven, Henry, Lord Arlington, Anthony, Lord Ashley, Sir John Robinson, Sir Robert Vyner, Sir

Peter Colleton, Sir Edward Hungerford, Sir Paul Neele, Sir John Griffith, and Sir Philip Carteret, James Hayes, John Kirke, Frances Millington, William Prettyman, John Fenn and John Portman, that they and such others as shall be admitted into the said Society as is hereafter expressed, shall be one Body Corporate and Politique, in Deed and in Name by the Name of The Governor and Company of Adventurers of England Trading into Hudson's Bay, and them by the Name of the Governor and Company of Adventurers of England Trading into Hudson's Bay, one Body Corporate and Politique, in

10 Deed and in Name, really and fully forever for Us, Our Heirs and Successors. WE DO make, ordain, constitute, establish, confirm and declare, by these Presents, and that by the same Name of Governor and Company of Adventurers of England Trading into Hudson's Bay, they shall have perpetual Succession, and that they and their Successors by the Name of the Governor and Company of Adventurers of England trading into Hudson's Bay, be and at all Times hereafter shall be, personable and capable in Law to have, purchase, receive, possess, enjoy and retain Lands, Rents, Privileges, Liberties, Jurisdictions, Franchises, and Hereditaments, of what kind, Nature,

20 or Quality, soever they be, to them and their Successors, and also to give, grant, demise, alien, assign and dispose Lands, Tenements and Hereditaments, and to do and execute all and singular other Things by the same Name that to them shall or may appertain to do¹ (Case, p. 7, l. 13. Further, at p. 11, l. 27. And to the End the said Governor and Company of Adventurers of England trading into Hudson's Bay, may be encouraged to undertake, and effectually to prosecute the said design of Our more especial Grace, certain Knowledge, and mere motion, WE HAVE given, granted and confirmed, and by these Presents, for Us, our Heirs and Successors, do give

30 grant and confirm, unto the said Governor and Company, and their Successors, the sole Trade and Commerce of all these Seas, Straights, Bays, Rivers, Lakes, Creeks and Sounds, in whatsoever Latitude they shall be, that lie within the Entrance of the Straights commonly called Hudson's Straights, together with all the Lands and Territories upon the Countries Coasts and Confines of the Seas, Bays, Lakes, Rivers, Creeks and Sounds aforesaid, that are not already actually possessed by, or granted to any of our Subjects or possessed by the Subjects of any other Christian Prince or State, with the Fishing of all sorts of Fish, Whales, Sturgeons, and all other Royal

40 Fishes, in the Seas, Bays, Inlets and Rivers within the Premises, and the Fish therein taken, together with the Royalty of the Sea upon the Coasts within the Limits aforesaid, and all Mines Royal as well discovered as not discovered, of Gold, Silver, Gems and precious Stones, to be found or discovered within the Territories, Limits, and Places aforesaid, and that the said Land be from henceforth reckoned and reputed as one of our Plantations or Colonies in America, called Rupert's Land. AND FURTHER WE DO by these Presents, for

- Us, Our Heirs and Successors make, create and constitute the said Governor and Company for the Time being, and their Successors the true and absolute Lords and Proprietors of the same Territory, Limits and Places aforesaid, and of all other the Premises, SAVING ALWAYS the Faith Allegiance and Sovereign Dominion due to us, Our Heirs and Successors for the same TO HAVE, HOLD, possess and enjoy the said Territory, Limits and Places, and all and singular other the premises hereby granted as aforesaid, with their and every of their Rights, Members, Jurisdictions, *Prerogatives*, *Royalties* and Appurtenances whatsoever, to them the said Governor and Company and their Successors for ever TO BE HOLDEN of Us, Our Heirs and Successors, as of Our Manor of East Greenwich in our County of Kent in free and common Socage and not in Capite or by Knight's Service." At p 15, l 32 there is an express reference to the Company's forts, factories, colonies and trade. Under this express and definite language all mines royal of gold, silver, gems and precious stones, whether discovered or not became vested in the Company. For this purpose such language was apparently required in view of the **Case of Mines; Regina v. Earl of Northumberland**, 20 1568 1 Plowden 310, 75 E.R. 472 17 English Ruling Cases, 393. In that case all the Justices of England and the Barons of the Exchequer unanimously resolved: "First, all the Justices and Barons agreed that by the law all mines of gold and silver within the realm, whether they be in the lands of the Queen, or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore. Also they all agreed that a mine royal, whether of base metal containing gold or silver, or of pure gold and silver only, may by the grant of the King be severed from the Crown, and be granted to another, for it is not an incident inseparable to the Crown, but may be severed from it by apt and precise words."

Referring to this decision in **Woolley v. A.G. of Victoria**, L.R. 2 A.C. 163 Sir James W. Colvile at 166 said: "Now whatever may be the reasons assigned in the case in Plowden for the rule thereby established, and whether they approve themselves or not to modern minds, it is perfectly clear that ever since that decision it has been settled law in England that the prerogative right of the Crown to gold and silver found in mines will not pass under a grant of land severed from the Crown unless by apt and precise words the intention of the Crown be expressed that it shall pass."

Thus, then is the starting point that in 1670 the precious metals in the lands of the Company were expressly granted to it. When thus granted, they became, while in the Company part of the land the same as other metals.

THE BRITISH NORTH AMERICA ACT 1867

Section 109 of this Act reads "All Lands Mmes. Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, Mmes. Minerals or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same "

- 10 In *A.G. of Ontario v. Mercer*, L.R. 8 A.C. 767, it was held that these words included royalties in respect of lands.

Section 146 provided for the admission of Rupert's Land and the North-western Territory into the Union and enacted that the provisions of any Order in Council in that behalf should have effect as if enacted by the Parliament of Great Britain and Ireland (Case p. 55).

RUPERT'S LAND ACT 1868

- This statute is in Schedule "B" to the Reference (Case p. 18). It recites the Company's charter, the British North America Act, and that it is expedient that the lands of the Company should be surrendered to Her Majesty "upon such terms and conditions as may be agreed upon by and between Her Majesty and the said Governor and Company."

Section 2 defines Rupert's Land, for the purposes of the Act, as including "the whole of the lands and territories held or claimed to be held by the said Governor and Company "

Section 3 enables the Company to surrender and Her Majesty to accept "*all or any of the lands* upon such terms and conditions as shall be agreed upon" between them

- 30 Section 4 enacts that the rights so surrendered shall be extinguished

Section 5 makes provision for admitting Rupert's Land into the Dominion of Canada, and for the Parliament of Canada to make laws therein

SURRENDER BY COMPANY, 1869

- This also is contained in Schedule "B" to the Reference, and bears date the 19th of November, 1869 (Case p. 33). It recites (1) the charter of the Company; (2) the exercise and enjoyment of such charter and other rights; (3) the British North America Act, 40 1867; (4) Rupert's Land Act, 1868, (5) the agreement between Her Majesty and the Company "to terms and conditions upon which the said Governor and Company shall surrender to Her said Majesty, pursuant to the provisions in that behalf in the Rupert's Land

Act, 1868,' contained, all the rights of Government and other rights, privileges, liberties, franchises, powers, and authorities, and all the lands and territories *(except and subject as in the said terms and conditions expressed or mentioned)* granted or purported to be granted by the said Letters Patent" (Case p 34, l 26), (6) the said terms and conditions of the surrender set forth in clauses numbered 1 to 14, and (7) the intention to make the surrender in pursuance of such agreement and *upon the said terms and conditions*

Then 'in pursuance of the powers and provisions of the 'Rupert's Land Act, 1868,' and *on the terms and conditions aforesaid* and also on condition of this surrender being accepted pursuant to the provisions of that Act the said Governor and Company do hereby surrender to the Queen's Most Gracious Majesty *all the rights of Government, and other rights privileges liberties franchises, powers and authorities,* granted or purported to be granted to the said Governor and Company by the said recited Letters Patent of His Late Majesty King Charles the Second, and also all similar rights which may have been exercised or assumed by the said Governor and Company in any parts of British North America not forming part of Rupert's Land or of Canada, or of British Columbia *and all the lands and territories within Rupert's Land (except and subject as in the said terms and conditions mentioned)* granted or purported to be granted to the said Governor and Company by the said Letters Patent" (Case p 36, l 27.)

NO SURRENDER OF PRECIOUS METALS

The Company's Charter, as already shown, granted the precious metals to the Company (Case p 11, l 41). They did not become vested in it by reason of the grant of land but by reason of the grant of them in express words. While precious metals remain in the Crown they are not held as part of the land or as incident to the land, but as prerogatives of the Crown. Upon this the following authorities are cited

A.G. of British Columbia v. A.G. of Canada, L.R. 14 A.C. 293
Lord Watson for the Judicial Committee at 302

"According to the law of England gold and silver mines, until they have been aptly severed from the title of the Crown, and vested in a subject, are not regarded as *partes soli*, or as incidents of the land in which they are found. Not only so, but the right of the Crown to land and the baser metals which it contains, stands upon a different title from that to which its right to the precious metals must be ascribed. In the Mines Case, 1 Plowd. 336, all the justices and barons agreed that, in the case of the baser metals, no prerogative is given to the Crown, whereas 'all mines of gold and silver within the realm, whether

they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore.' In British Columbia the right to public lands, and the right to precious metals in all provincial lands, whether public or private, still rest upon titles as distinct as if the Crown had never parted with its beneficial interests, and the Crown assigned these beneficial interests to the Government of the Province in order that they might be appropriated to the same state purposes to which they would have been applicable if they had remained in the possession of the Crown. Although the Provincial Government has now the disposal of all revenues derived from prerogative rights connected with land or minerals in British Columbia, these revenues differ in legal quality from the ordinary territorial revenues of the Crown. It therefore appears to their Lordships that a conveyance by the Province of 'public lands,' which is, in substance, an assignment of its right to appropriate the territorial revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown."

And at 305

"The exception created by the 11th Article of Union, from the rights specially assigned to the province by sect 109, is of 'lands merely.' The expression lands in that article admittedly carries with it the baser metals: that is to say, 'mines' and 'minerals,' in the sense of sect 109. Mines and minerals, in that sense are incidents of land, and, as such have been invariably granted in accordance with the uniform course of Provincial legislation, to settlers who purchased land in British Columbia. But *jura regalia* are not accessories of land, and their Lordships are of opinion that the rights to which the Dominion Government became entitled under the 11th article did not, to any extent, derogate from the Provincial right to 'royalties' connected with mines and minerals under sect 109 of the British North America Act."

While the precious metals and the land are vested in the owner, other than the Crown, such metals are part of the land and pass from such owner by a grant absolute in terms, of the fee simple estate in the land. **Re St. Eugene Mining Company**, 7 B.C.R. 288, Drake J. at 289. In the Deed of Surrender the land surrendered is described as follows: "All the lands and territories within Rupert's Land (except and subject as in the said terms and conditions mentioned) granted or purported to be granted to the said Governor and Company by the said Letters Patent" (Case p 37, l 3). But, as pointed out, the letters patent did not grant or purport to grant the

gold and silver as part of the land, and they did not pass from the Crown to the Company under such grant. They were granted as separate and distinct property and depended upon a different title from the title to the land. What the Company surrendered was thus the *land granted* which did not include the precious metals. There is therefore no grant, conveyance or surrender by the Company to the Crown of the precious metals.

- The first part of the operative clause of the surrender covers governmental rights and privileges, and contains no words apt to
 10 convey these minerals. These words include the powers in the letters patent, just as the words "lands and territories" include those granted by the letters patent. There is also the word "other" to be considered and the *ejusdem generis* rule applies.

The ownership of precious metals by the owner of the land in which they are found is not a right, privilege, liberty, franchise, power or authority. In such a case it is part of his estate in the land. Even if it were a right while held by the Crown or a person other than the owner of the land, once it is vested in the owner of the land it merges in the land and becomes extinguished.

- 20 The language is not amplified by the addition of any words usually found in conveyances following the description of the parcels of land, such as "together with their appurtenances," or "together with all profits, privileges, rights and appurtenances to the said hereditaments belonging or with the same or any part thereof held or enjoyed or appurtenant thereto." It is "all the lands and territories granted or purported to be granted to the said Governor and Company by the said letters patent." It should be construed in favor of the subject, and is of course not affected by any of our modern statutes providing Short Forms for conveyancing.
- 30 The alternative interpretation, namely, that the Company by this deed conveyed to the Crown the gold and silver in the land surrendered, will be considered, but this is subject to the foregoing submission, and is not to prejudice it.

LAND OCCUPIED BY THE COMPANY

- One of the terms and conditions of the surrender was the following: "The Company to retain all the posts or stations now actually possessed and occupied by them or their officers or agents whether in
Rupert's Land or in any other part of British North America." clause 2 of conditions. (Case p 35, l 1.) Under its charter the Company
 40 had express power to erect and build forts, garrisons, colonies, or plantations, towns or villages. (Case p 15, l 32 to p 16, l 44.) A list of the posts or stations in part of the territory appears as a schedule to the deed of surrender (Case p 35, l 1 to 8, p 37, l 9 to p 41, l 3-35), and these number 119.

By "posts and stations" was meant not merely the buildings and equipment but the land possessed and occupied by the Company at such places, and the estate and interest therein then held by the Company, that is, a fee simple estate with the right to the precious metals therein previously granted by the Crown. This land the Company was "to retain". It did not under the surrender ever pass from the Company at all.

Webster defines the word "retain" thus: "to continue to hold, have, use, recognize, etc., to keep in possession, control, use, custody, etc., to keep, not to loose, part with, dismiss, or permit to escape."

The Trustee Act, 1888, cap. 59 of 51 and 52 Victoria, in section 8 refers to the proceeds of property "still retained by the trustee". Upon this Kekewich, J. in *Re Timmins, Nixon v. Smith*, L.R. 1902, 1 Ch. 176, at 185, said: "As I pointed out in the argument the Legislature has carefully used the word 'retained' as meaning what it says, namely, money which is not merely in the eye of the law in the hands of the trustee, because he has never paid it away to a person entitled to give a discharge, but money which is really in his pocket in the sense that it is invested in his name, or in land belonging to him, or in the name of some other person as trustee for him. In order to say that it is 'retained,' you must be able to put your finger on the property or the proceeds and say that it is still under the control of the trustees."

Clearly the Company had and retained the precious metals in these lands so actually occupied in Rupert's Land. As to those situate outside of Rupert's Land, such as those in the North Western Territory, there is this consideration: a difference appears in the language of this condition in the surrender and in the Order-in-Council. In the former it is the posts "whether in Rupert's Land or any other part of British North America" (Case p. 35, l. 2). In the latter it is the posts "in the North Western Territory" (Case p. 22, l. 34). The Company by the surrender retained all those posts it occupied in British North America. The Order-in-Council did not take anything from the Company. It was not intended that it should. But it confirmed in the Company the titles to the land actually occupied by it in British territory, and to the same extent as the land it owned under express grant from the Crown.

LAND ADJOINING THE POSTS

Another condition of the Surrender is contained in clauses 2, 3 and 4 and was the following: (The Company) "may within twelve months after the acceptance of the said surrender select a block of land adjoining each of their posts or stations within any part of British North America, not comprised in Canada and British Columbia in conformity, except as regards the Red River Territory, with a list made out by the Company and communicated to the Canadian

Ministers, being the list in the annexed schedule" (Case p. 35, ll. 3 to 8) Clauses 3 and 4 contain provisions as to the size, location and shape of such blocks of land. The actual size of each block was fixed, except those at Upper Fort Garry and Lower Fort Garry, each was to front on the river or road used as access to the post, and the dimensions were approximately fixed also. An actual survey was to be made with all convenient speed. It was impossible to describe these parcels of land more definitely at the time, but that fact did not affect the Company's title to them in the meantime.

- 10 In clauses 2, 3 and 4, the phrase used is "a block of land adjoining each of their posts or stations." "each block," "the blocks." In clauses 8 and 9 these blocks of land are again mentioned and there the language is "any block of land reserved to the Company." Case p. 35, l. 35, to p. 36, l. 9.) Under this condition the Surrender did not divest the Company of its then title to such blocks of land, but such title was reserved to the Company pending the survey and selection. This condition applied to posts not only in Rupert's Land but in any part of British North America excepting Canada and British Columbia. There is no suggestion that the title of the
- 20 Company to the land without Rupert's Land was different to that within. The word "land" as applied to a parcel within Rupert's Land included these precious minerals, and the word should be given the same meaning in all cases in the document.

In *Courtauld v. Legh*, L.R. 4 Ex. 126, Cleasby, B. said at 130 "It is a sound rule of construction to give the same meaning to the same words occurring in different parts of an act of parliament or other document." Other authorities to this effect are

Ridgeway v. Munkittrick, 1841, 1 Drury & Warren, 84, 93.

- In *Re Birks, Kenyon v. Birks*, L.R. 1900, 1 Ch. 417. Lindley, 30 M.R. 418.

CROWN PATENTS FOR POSTS AND LAND ADJOINING THE POSTS

Patents were issued to the Company for the land occupied as posts and for the land selected adjoining the various posts. Paragraph 6 of the Reference, (Case p. 4, l. 4.) The patent for the 100 acres at Fairford (p. 38, l. 19) is part of the Case, p. 42, and its language is important. Among other recitals it reads

- 40 "And whereas the block of land to be retained by the Company adjoining the Post or Station hereinafter mentioned has been duly selected, surveyed and set out, and it is expedient that Letters Patent granting to the Company such block of land should be issued."

These patents were issued as evidence of the Company's title.

and for purposes of registration and of specifying the boundaries. The Company's title was good without a patent.

In *Calgary and Edmonton Land Co. v. The King*, Coutlee's Supreme Court Cases 271, the question before this Court was as to the right of the Dominion to reserve mines and minerals from patents of land forming part of a railway land grant. Chief Justice Taschereau said at 275

10 "Then section eight of the regulations of September, 1889, applies to patents to be issued in the ordinary course. The appellants' title is perfect without a patent. The patent is only evidence of the allotment. It is a parliamentary title under a contract. The subsequent allotment by the Department of the Interior and the Governor-in-Council of the particular lands so granted could not contain any derogation from that contract either expressly or impliedly."

This judgment was approved by the Privy Council L.R. 1904 A.C. 765, in the following language of Lord Landley at 771

20 'Upon this question their Lordships concur with the Chief Justice and Grouard, J. in thinking that the special Act and Order in Council of June 27, 1900 are the governing documents'

LAND IN FERTILE BELT

A further condition was the following

30 "The Company may, for fifty years after the surrender claim in any township or district within the Fertile Belt, in which land is set out for settlement, grants of land not exceeding one-twentieth part of the land so set out. The blocks so granted to be determined by lot, and the Company to pay a rateable share of the survey expenses, not exceeding 8 cents Canadian an acre. The Company may defer the exercise of their right of claiming the proportion of each township for not more than ten years after it is set out, but their claim must be limited to an allotment from the lands remaining unsold at the time they declare their intention to make it." (Case p. 23, l. 7)

Clause 6 gives the boundaries of the fertile belt, and 7 contains provisions which in effect extend the boundaries of land available.

Different expressions are used in the document with reference to this term or condition. We find these: 'The Company may claim in any township or district grants of land,'

40 "the blocks so granted," "their right of claiming their proportion of each township or district," "the Company may take their one twentieth of any such township," 'portion of land coming to them of townships established'

The land referred to in these clauses was land of the same estate as the Company held, and with all the incidents then belonging to it. There is nothing to suggest the contrary view. This land is treated in clause 7 as of equal value per acre. To except from this land the precious minerals would necessitate the giving to the word "land" or the equivalent in clauses 5 and 7, a different and more limited meaning from that required in clauses 2, 3, 4, 8 and 9 which as already shown offends against the rule of construction.

The nature of the instrument in which the word occurs has to be considered in determining its meaning. If the document were a grant from the Crown, the onus would be upon the Company to prove that by necessary implication no reservation to the Crown of gold and silver was intended, while if the document is primarily not in the nature of a grant, the word would bear the meaning contended for by the Company and the onus would be upon the Crown to show that by necessary implication gold and silver are reserved.

Assuming for the present purpose that these conditions are to be considered as grants, the Company submits that they constitute a small and relatively unimportant part of the instrument, and that they do not determine the nature of the instrument. It cannot be argued that its primary object was a grant by the Crown to the Company. The predominating purpose was undoubtedly to surrender the governing power in Rupert's Land and incidentally of part of the land. The change involved a surrender by the former governing power of the ownership of a portion of the land in addition to all the powers of government. It is analogous to a treaty between sovereign powers, and should be so interpreted. Even assuming that conditions two and five constitute a re-grant, it cannot therefore be said that these two relatively small provisions impress the whole instrument with the nature of a grant from the Crown, so as to impart to all the terms therein the technical meaning which they would bear in such a grant.

In *Lion Insurance Assoc. v. Tucker* (1883) 12 Q.B.D. 176, Brett, M.R. at p. 186 said:

Whenever you have to construe a statute or document, you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject matter with regard to which they are used, unless there is something which obliges you to read them in a sense which is not their ordinary sense in the English language as so applied. That, I take it, is the cardinal rule.

The subject matter here is not a grant calling for a narrow interpretation of the words, but a transaction involving the transfer of the widest and most general powers from one governing body to

another, and calling for an interpretation of terms in their most general and inclusive sense

In **Brett v. Brett** (1826) 3 Adams, 210, Sir John Nichol said that "to arrive at the true meaning of any particular phrase in a statute, the particular phrase is not to be viewed detached from its context in the statute it is to be viewed in connection with its whole context, meaning by this as well the title and preamble as the purview or enacting part of the statute."

In **In re Jodred** L.R. 44 Ch. D. 590, Lord Halsbury at p. 605 said

- 10 "For myself, I am prepared to look at the instrument such as it is, to see the language that is used in it, to look at the whole of the document and not to part of it, and having looked at the whole of the document, to see (if I can) through the instrument what was the mind of the testator. Those are general principles for the construction of all instruments, and to that extent it may be said that they are canons of construction."

There is therefore no justification for separating this condition from the rest of the document, and considering it as a distinct entity.

- These clauses are part of a larger whole and must be considered with
20 reference to the other parts and the main purpose of the whole. "Land" therefore cannot be restricted in its meaning to the technical significance it would bear in an instrument the chief or only object of which would be to evidence a grant from the Crown. And if its meaning cannot be thus restricted it must bear its ordinary and primary meaning or a meaning consistent with the rest of the surrender. In this case its ordinary and primary meaning is consistent with the rest of the document and includes the precious metals.

In **Bruner v. Moore** L.R. 1 Ch. 305, Farwell, J. at 310 said

- 30 "It is therefore a question of construction in each case, to which the ordinary rules of construction apply, namely that words must bear their ordinary primary meaning unless the context of the instrument read as a whole, or surrounding contemporaneous circumstances show that the secondary meaning expresses the real intention of the parties, or unless the words are used in connection with some place, trade, or the like, in which they have acquired the secondary meaning as their customary meaning *quoad hoc*. This is a question of fact which (unless so often proved as to be judicially recognized) has to be proved by evidence."

- 40 In **Grey v. Pearson** (1857) 6 H.L.C. 61 Lord Wensleydale said at p. 106

"In construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instru-

ment, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further. This is laid down by Mr Justice Burton, in a very excellent opinion which is to be found in the case of *Warburton v. Loveland* (1828) 1 Hud & B (1r) 623 at p 648 "

The meaning of the word "land" contended for by the Company in these clauses is the ordinary primary meaning of the word, and there is nothing in the context reading the deed as a whole or in the surrounding contemporaneous circumstances to indicate that any other meaning should be given to the word. Nor would this meaning lead to any absurdity, repugnance or inconsistency with the rest of the deed. On the contrary, it is the meaning which the word "land" or "lands" obviously bears in all other parts of the document, and the results arising from giving the words this meaning are perfectly consistent with the purpose and objects of the deed, and with all its provisions.

When the Parliament of Canada for the first time enacted legislation affecting these lands it placed as the heading of the sections in the statute this "Lands Reserved by the Hudson's Bay Company" section 17 chapter 23, 1872 (Case p 66, l 20). It then recited that "the said Company is entitled to one twentieth of the lands."

This strongly supports the view that the Company's share of land in the fertile belt did not pass from it to the Crown, and then revert in it by way of regrant, but was reserved in and remained in it throughout. Upon this view there would be no question of the ownership of precious minerals in these lands.

No question is submitted to the Court upon this point, as by agreement the provisions as to the particular land falling to the Company as its share under these clauses were changed.

CONFIRMATION BY CROWN OF COMPANY'S GRANTS

Clause 10 of these conditions is as follows

"All titles to land up to the eighth day of March, one thousand eight hundred and sixty-nine, conferred by the Company are to be confirmed" (Case p 36, l 10)

Provision for implementing this term was made by Parliament in the Manitoba Act, cap 3, 1870, sec 32 (Case p 57, l 22). Grants by the Company of land prior to the Surrender carried the precious metals, if any, unless expressly reserved, and the confirmation by the Crown undertaken in this clause 10, and provided for by this legislation would not deprive the grantee of that ownership, but merely confirm it. It is unlikely that the title of the Company to any parcel of land retained or reserved under the surrender, either as part of

the land actually occupied, or to be selected adjoining that occupied, or in the fertile belt, would be less than the title conferred by the Company upon its immediate grantees. To create such a position some different language would be required.

EXCEPTIONS FROM THE SURRENDER

The Surrender is made 'on the terms and conditions aforesaid' (Case p 36, l 28). Further there is interjected in the description of the land surrendered the phrase "*except and subject as in the said terms and conditions*" (Case p 37, l 3). Thus the surrender of the 10 governmental and other such rights, and also of the land is upon these terms and conditions, but the surrender of the land further excepts and is made subject to them. The land so excepted was in fact never conveyed to the Crown.

In **Duke of Hamilton v. Graham**, L R 2 S A 166, Lord Chancellor Hatherley said at p 168

"By the law of England when you demise a property, excepting a certain part of it, there is no demise of the part excepted. Thus minerals excepted remain in the lessor. The lessee takes no interest or right whatever in them."

20 **Armour on Titles**, Third Edition, p 235.

"An exception must be of a part of the subject of the grant which does not pass thereby but is severed and retained by the grantor."

If the phrase 'all the lands and territories within Rupert's Land' includes the precious metals as incidents thereof the land excepted would also include them and those in the lands of the Company would thus never pass to the Crown under this deed.

The surrender was made by the Company upon the request of Canada, evidenced by the Addresses of Parliament, approved as 30 they were by Her Majesty (Case p 21, l 12) and not at the solicitation of the Company. Under such circumstances it should be construed in favor of the subject. **6 Halsbury**, title Constitutional Law, p 480, par 748.

"The grant will also be construed in favour of the subject where it is expressed to be made, not at the solicitation of the latter, but (as is frequently the case) '*ex speciali gratia, certa scientia, et mero motu regis*'."

40 "If the grant is for valuable consideration it must be construed strictly in favour of the grantee, for the honour of the King."

In **Doe d. Devine v. Wilson**, 10 Moo. P C 502, and in **Hyatt v. Mills**, 20 O R 351, 19 O A R 329, it was decided that a patent of

land is to be upheld rather than avoided, and is to be construed most favourably for the grantee

In *Clark v. Bonnycastle*, 3 U C Q B (O S) 528, it was held at 544 that grants from the Crown either for valuable consideration or of special favour are to be construed in the same manner as deeds from subject to subject. *Sherwood, J.* at 544, said

10 "For the removing of this doubt, it will be necessary to examine the rule of construction applicable to grants from the crown, which appears to be that grants from and to the crown must in general be construed most favourable for the king — 2 Roll 219, 2 Co 24, 5 Co 56 Plow 243. But there are several exceptions to this rule. One of these is, that the construction shall be in favour of the grantee, when the grant is made for a valuable consideration or when it is made ex speciali gratia certa scientia et mero motu regis. 1 Co 40, 10 Co 112, 2 Inst 466, 6 Co 56a, 10 Co 65, Plow 337, 3 Leon 249. The grant to Elsworth is of this latter description and the rule of construction applicable to this class. I take to be the same in substance 20 with regard to grants by indenture from one subject to another, in which the intention of the parties is the true criterion. 9 Co 131a, 10 Co 67 B, Com. Dig., Grant 12 Bac Ab 604."

If it should be argued that the land occupied by the posts, the land adjoining the posts and the one-twentieth share of land in the fertile belt were not excepted from the surrender, but passed from the Company to the Crown subject to the Company's right to obtain such land by way of regrant, the answer is that this ignores the use of the words "except," "retained," and "reserved," and these rules of construction, and does not give proper effect to the language of the document.

30

KNOWLEDGE OF MINERALS

All parties to the transfer had at that time before their minds the minerals in Rupert's Land and the North Western Territory as a valuable asset, and their existence was, in fact, given as one of the reasons for the transfer. This is shown by the reference to them in the first address of the House of Commons of the 17th December, 1867 which set forth as one of the reasons for the transfer "the development of the mineral wealth which abounds in the region of the North-West." (Case p. 24, l. 25.)

40 In a Memorial of Thomas Spence and others of the Red River Settlement to Her Majesty the Queen of the 3rd of December, 1869, praying that part of Rupert's Land known as Assiniboia be created a Crown Colony, this sentence occurs

"While notwithstanding our superior climate, and vast agricultural and mineral resources, we remain helpless to advance

in developing the same, having no outlet or market, besides being entirely indebted to the enterprise of a foreign power, for any postal, or other communication with the outer world '

Dominion Archives, M 155, p 348, printed in publications of the Canadian Archives No. 9, entitled, The Canadian North-West, Its Early Development, Vol 2, p 873.

Frequent references to gold and silver appear in the correspondence between the Colonial Secretary and the Company leading up to the surrender, for example

- 10 (a) In a letter from H. H. Bercus, representing the Company, to His Grace, the Duke of Newcastle, of the 1st of May, 1862, published in a return to an Address of the House of Lords, dated the 2nd of July, 1863, this appears

'We are informed that exaggerated reports of the discovery of gold in the head waters of the Saskatchewan have been widely circulated both in the U.S. and Canada, and that an apprehension exists at Red River, that a very large number of people will flock into the country in consequence of these rumours.'

- 20 (b) In a petition of the Archbishop of Rupert's Land and others of the 30th October, 1862, to Her Majesty, printed in the same return, this appears

- 'But that, moreover, there are certain special considerations which your petitioners would desire to press upon . . . the Home Government, arising out of the circumstance of the Red River having lately become a point of transit from the United States to the gold fields of British Columbia, on the West side of the Rocky Mountains, of whom it may be mentioned upwards of 200 passed through the settlement this summer, and of the still more important fact that upon the undoubted authority of eye-witnesses of the highest respectability gold has recently been discovered on the East side of the Rocky Mountains in the valley of the Saskatchewan River and other localities "
- 30

(c) In a letter from the Rt. Hon. Sir Edmund Head, representing the Company, to Sir Frederic Rogers, of the 11th November, 1863, printed in a return to an Address of the Honourable the House of Commons of the 5th of August, 1869, this appears

- 40 "The most obvious, simple and satisfactory settlement of the question of transfer would of course be that the Crown should compensate the company for their property by a sum of money paid either at once or in a series of annual payments, but to the supposed value of the soil would have to be added the price of the Company's interest of all mines of gold and

silver which are by express words given in the charter. It is clear that the recent discovery of gold in the territory would cause the proprietary to reject any bargain which implied the gratuitous cession of those rights."

- "The Crown shall resume the grant of mines and diggings of gold and silver throughout the colony on condition of paying to the Hudson's Bay Company one third of the receipts of all dues, royalties, rents, etc., from such mines or diggings whether raised by way of export duty or otherwise, but the Company should not be liable for expenses of collection or escort."

(d) In a letter from the Rt. Hon. Sir Edmund Head to C. Portescue, Esq., M.P., of the 13th April, 1864, published in the Appendix of the same Return, this appears:

"If, however, any limit in the amount of the payments to be made to the Company by this and the next article is absolutely required, the committee would be willing to agree that the produce of the two together; i.e., of the 1s. an acre for land and the percentage on the gold, should not, in the aggregate, exceed £1,000,000."

- (e) In a letter from the Rt. Hon. C. B. Adderley to Sir Curtis Sampson, Bart., of the 23rd of April, 1868, printed in the same Return, this appears:

"I am desirous to call your attention to the negotiations which took place in 1864 between the Secretary of State and the Company as recorded in the correspondence referred to in the margin and I am to request that you will state what are the terms which the company would be prepared to accept, proceeding on the principles then adopted, namely that the compensation should be derived from the future proceeds of the lands, and of any gold which may be discovered in Rupert's Land, coupled with reservations of defined portions of land to the Company."

(f) In a letter from Sir George E. Cartier, Bart. and William McDougall, Esq., C.B., to Sir Frederic Rogers, Bart. of the 16th of January, 1869, published in the same Return, this appears:

"We have omitted from the last term the one-fourth of the Government receipts from gold and silver, for two reasons: first, it has not been shown that there are any gold or silver mines in the territory that will pay for working; second, all the attempts heretofore made to obtain a revenue from such sources in Canada have failed, and public opinion has forced the local Governments to adopt the policy of what may be called 'free mining' or cheap lands for miners and abolition of royalties and

imposts except to meet the cost of preserving the peace, and of surveys and necessary supervision."

Later, when the Parliament of Canada passed legislation affecting these lands in the Dominion Lands Act, 1872, Chapter 23, it expressly referred to the gold and silver sections 36, 37, 38, 39 and 41 (Case p. 73, l. 25)

These documents can be considered for the purpose of showing the surrounding circumstances and the history of the subject-matter, and to enable the Court to construe the document by such light

10 Upon this Counsel cites.

In re Branch Lmes, Canadian Pacific Railway Co. v. James Bay Railway Co., 36 S.C.R. 42

Mr. Justice Nesbitt at p. 89.

Mr. Justice Idington at p. 103

This principle applies more especially in constitutional cases.

St. Catharines Milling & Lumber Co. v. The Queen, 13 S.C.R. 577.

Strong, J. at 606

10 **In re Representation in the House of Commons**, 33 S.C.R. 475
Barrett v. City of Winnipeg, 7 M.R. 273

Killam, J. at 295

ORDER IN COUNCIL, 1870, ADMITTING RUPERT'S LAND INTO CANADA

This recites

(1) The British North America Act, 1867

(2) The first address of the 17th of December 1867, from the Parliament of Canada praying for the union of Rupert's Land and North-Western Territory with Canada

(3) The Rupert's Land Act, 1868

30 (4) The second address of the 31st of May, 1869, from the Parliament of Canada to unite Rupert's Land on the terms and conditions in resolutions and the address and also to unite the North-Western Territory

(5) The submission to Canada of a draft surrender containing specified stipulations

(6) The approval of such draft by the Governor-General and the expediency of including such stipulations in the surrender

(7) The surrender of the 19th of November, 1869

40 June, 1870 (8) The acceptance of the said surrender on the 22nd of

It is then ordered and declared that from the 15th of July, 1870, the North-Western Territory shall be admitted into Canada upon the terms in the first address, and that Rupert's Land should also be admitted upon the terms and conditions remaining to be

performed in the second address, and these it then sets forth (Case, p. 20.)

The first address represented:

'That in the event of your Majesty's Government agreeing to transfer to Canada the jurisdiction and control over the said region, the Government and Parliament of Canada will be ready to provide that the legal rights of any corporation, company or individual within the same shall be respected, and placed under the protection of Courts of competent jurisdiction' (Case p 25, l. 13.)

Some legal rights of the Company were the right to retain its posts and to reserve land adjoining them, and these Canada undertook to respect.

The admission of Rupert's Land was upon the terms and conditions in the Surrender, with the modification in clause 2 thereof already discussed

The Order-in-Council as already shown has the force of a statute of the Parliament of the United Kingdom. It does not, however, in any way prejudice or detract from the Surrender. The terms in it have been approved by a later statute, The British North America Act, 1871, cap 28, section 5

THE MANITOBA ACT, 1870

The Dominion Parliament, on 22nd of June, 1869, passed 'An Act for the temporary government of Rupert's Land and the North-Western Territory when united with Canada,' Chapter 3 of 32 and 33 Vict

The Manitoba Act, Chapter 3 of 33 Victoria, assented to on the 12th of May, 1870, but to take effect upon the admission of Rupert's Land into Canada, in section 30 enacts as follows

'All ungranted or waste lands in the Province shall be, from and after the date of the said transfer, vested in the Crown, and administered by the Government of Canada for the purposes of the Dominion, *subject to and except and so far as the same may be affected by, the conditions and stipulations contained in the agreement for the surrender of Rupert's Land by the Hudson's Bay Company to Her Majesty*' (Case p 57, l 7)

The language is "all ungranted or waste lands". The ungranted lands were those surrendered by the Company as distinguished from those sold by it to settlers as mentioned in clause 10 of the conditions of the transfer or retained by it. Nowhere in the Act is gold or silver mentioned

There was a question as to the power of the Parliament of Canada to create the Province, and Imperial legislation was sub-

sequently enacted, Chapter 28 of 34 and 35 Victoria. The British North America Act, 1871. Section 5 of it reads

"The following Acts passed by the said Parliament of Canada, and intituled respectively,

'An Act for the temporary government of Rupert's Land and the North Western Territory when united with Canada;' and

10 'An Act to amend and continue the Act thirty-two and thirty-three Victoria, chapter three, and to establish and provide for the government of the Province of Manitoba,'

shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor-General of the said Dominion of Canada '

The language of the Canadian Parliament so approved by the Parliament of the United Kingdom, is '*subject to, and except and so far as the same may be affected by the conditions*' in the Surrender. This is a further strong and authoritative recognition of the fact that
20 these lands were excepted from the transfer by these conditions.

DOMINION LANDS ACT, 1872

By agreement between the Dominion of Canada and the Company, the method of selecting its share of the land in the fertile belt was changed. This is set forth in the first Dominion Lands Act, cap 23, 1872 (Case p. 62 to p. 93). Instead of its share of each township which fell to the Company being determined by lot, certain specific sections or parts of sections should be known and designated as the lands of the Company, and become vested in it.

By Minute of 7th of January, 1873 the Company resolved that
30 this Act and a supplementary order-in-council of December, 1872, "be taken and substituted for the provisions contained in the Deed of Surrender of Rupert's Land in all matters relating to the Company's one-twentieth of the lands within the Fertile Belt" (Case p. 45, 1-14.)

The agreement and sections 17 to 21 do not in any way lessen the Company's rights or interest in its share of the Fertile Belt. The change was made with a view to an equitable distribution throughout the territory described" and "to simplify the setting apart thereof." The survey and notice in ordinary cases were under the
40 statute to vest the title of these sections in fee simple in the Company without any patent.

The legislation in itself could not affect these lands, and for that reason the Company was asked to agree, and did agree, to substitute the Act and the Order-in-Council enabling it to reconvey to the Crown

any lands 'in all matters relating to the Company's one twentieth of the lands within the Fertile Belt'

It has already been argued that the Company owned the precious metals in such share of the land, and that argument applies to those selected by this new means also.

If there were any doubt about the Company's ownership of the gold and silver therein such is dissolved by the provisions of section 36. Land is not expressly interpreted in the Act as including these minerals, but there is no doubt of the intention of Parliament. The language of this section necessarily implies that these minerals vest in the patentee, and the rule of English law is abrogated so far as patents issued under this statute are concerned.

In cases of fractional or broken townships or of the occupation of these specific sections by settlers other lands were to be patented to the Company. The Company's title to such lands should be neither more nor less than its title to sections 8 and 26 when they became vested in it. Forms of patents adopted in such cases appear at pp. 47 and 49 of the Case.

It is submitted that the precious metals in these lands of the Company under this legislation were vested in the Company, upon the grounds that the Surrender and Order in Council had that effect, and that the Statute was substituted for it and that the Statute and agreement have clearly that effect as a contract.

CONSOLIDATION OF DOMINION LANDS ACT 1879

The Statute was consolidated and amended by cap. 31, 43 Vic. 1879 (Case p. 95). The same heading 'Lands Reserved by the Hudson's Bay Company' is used and the sections relating to these lands are 17 to 31 and old section 36 is 37. Section 129 reads as follows:

30 'Subject to the provisions hereinafter made, the Act passed in the thirty fifth year of Her Majesty's Reign and intituled 'An Act respecting the Public Lands of the Dominion,' and the Act passed in the thirty seventh year of Her Majesty's Reign and intituled 'An Act to amend the Dominion Lands Act' and the Act passed in the thirty ninth year of Her Majesty's Reign and intituled 'An Act to amend the Dominion Lands Acts,' are hereby repealed, and this Act is substituted for them. Provided always, that all enactments repealed by any of the said Acts shall remain repealed, and that all things lawfully done and all rights
40 acquired or liabilities incurred under them or any of them shall remain valid and may be enforced, and all proceedings and things lawfully commenced under them or any of them may be continued and completed under this Act, which shall not be con-

strued as a new law, but as a consolidation and continuation of the said repealed Acts subject to the amendments hereby made and incorporated with them, and any thing heretofore done under any provision in any of the said repealed Acts which is repeated without alteration in this Act, may be alleged or referred to as having been done under the Act in which such provision was made or under this Act."

Upon the words "reservation" and "reserved" see **3 Stroud**, p. 1729

10 AMENDMENT OF DOMINION LANDS ACT, 1880

By an amendment cap. 26, 43 Vic., section 37, cited above, was, with several other sections, repealed and a different provision was made for disposing of mineral lands. (Case p. 100) The Company did not consent to this amendment (Case p. 6, l. 8)

Cap. 1, 1867, an Act respecting the Statutes of Canada, reads as follows

20 "3. This section and the fourth, fifth, sixth, seventh and eighth section of this Act, and each provision thereof, shall extend and apply to every Act passed in the Session held in this thirtieth year of Her Majesty's Reign and in any future session of the Parliament of Canada, except in so far as the provision is inconsistent with the intent and object of such Act, or the interpretation which such provision would give to any word, expression or clause is inconsistent with the context, and except in so far as any provision thereof is in any such Act declared not applicable thereto, Nor shall the omission in any Act of a declaration that the 'Interpretation Act' shall apply thereto, be construed to prevent its so applying, although such express declaration may be inserted in some other Act or Acts of the same Session

30 "7 Subject to the limitations aforesaid,—in every Act of the Parliament of Canada, to which this section applies

"Thirty sixthly The repeal of an Act at any time shall not affect any act done or any right or right of action existing, accruing, accrued or established or any proceedings commenced in a civil cause, before the time when such repeal shall take effect, but the proceedings in such case shall be conformable when necessary to the repealing Act"

This was in force in 1880.

40 It is submitted that such repeal of section 37 did not under the cham of the Company's title, and in view of this provision of The Interpretation Act, affect its right to the precious metals in any of its lands

CONSOLIDATION OF DOMINION LANDS ACT, 1883

In 1883 the Act was further amended and consolidated by Chapter 17 The following is quoted from it

"Chap. 17

"An Act further to amend and to consolidate, as so amended, the several Acts respecting the Public Lands of the Dominion therein mentioned

10 " WHEREAS it is expedient, with a view to the proper and efficient administration and management of certain of the public lands of the Dominion that the same should be regulated by statute, and divers Acts have been passed for that purpose which it is expedient further to amend and to consolidate as so amended. Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows.

20 "(1) This Act applies exclusively to the public lands included in Manitoba and the several Territories of the Dominion, which lands shall be styled and known as Dominion Lands, and this Act shall be known and may be cited as the 'Dominion Lands Act, 1883, and the following terms and expressions therein shall be held to have the meaning hereinafter assigned them, unless such meaning be repugnant to the subject or inconsistent with the context, that is to say

**Disposal of Dominion Lands
Lands Reserved by the Hudson's Bay Company**

30 "18. Whereas by article five of the terms and conditions in the deed of surrender from the Hudson's Bay Company to the Crown the said Company is entitled to one-twentieth of the lands surveyed into townships in a certain portion of the territory surrendered, described and designated as the 'Fertile Belt';

40 "(2) And whereas by the terms of the said deed, the right to claim the said one-twentieth is extended over the period of fifty years, and it is provided that the lands comprising the same shall be determined by lot, and whereas the said Company and the Government of the Dominion have mutually agreed that with a view to an equitable distribution throughout the territory described of the said one-twentieth of the lands, and in order further to simplify the setting apart thereof, certain sections or parts of sections, alike in numbers and position in each township throughout the said territory shall as the townships are surveyed, be set apart and designated to meet and cover such one-twentieth,

"(3) And whereas it is found, by computation, that the said one-twentieth will be exactly met by allotting in every fifth

township two whole sections of six hundred and forty acres each, and in all other townships, one section and three-quarters of a section, therefore.

10 “(14) In every fifth township in the said territory, that is to say in those townships numbered 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, and so on in regular succession northerly from the international boundary, the whole of sections numbers 8 and 26, and in each and every of the other townships, the whole of section number 8 and the south half and north west quarter of section number 26 except in the cases hereinafter provided for) shall be known and designated as the lands of the said Company.

 “(15) Provided that the Company's one twentieth of the lands in fractional townships shall be satisfied out of one or other or both, as the case may be, of the sections numbers eight and twenty six as above, in such fractional townships, the allotment thereof to be effected by the Minister of the Interior and the said Company, or some person duly authorized by them respectively.

20 “(16) Provided further, that on the survey of a township being effected, should the sections so allotted or any of them, or any portion of them be found to have been *bona fide* settled on under the authority of any Order in Council or of this Act, then, if the Company forgo their right to the sections settled upon as aforesaid or any one or more of such sections they shall have the right to select a quantity of land equal to that so settled on and in lieu thereof, from any lands then unoccupied.

30 “(17) Provided also, as regards the sections and parts of sections as above mentioned that where the same may be situate in any township withdrawn from settlement and sale and held as timber lands under the provisions hereinafter contained, the same shall form no part of the timber limit or limits included in such township but shall be held to be the property of the Company.

40 “(18) Provided further, that one twentieth of the revenue derived from timber limits which may be granted in unsurveyed territory within the fertile belt as hereinafter provided shall be annually, so long as the townships comprised in the same remain unsurveyed, paid and accounted for to the Company, such one twentieth to cease or to be diminished in proportion as the townships comprised in such limits, or any of them, may be surveyed in which event the Company shall receive their one twentieth interest in the lands in such townships in sections eight and twenty six as here before enacted. Provided, nevertheless, that on such sections being surveyed as aforesaid, should the same or either of them prove to have been denuded of timber by the lessee to the extent of one half or more, then in such case the Company shall not be bound to accept such section

or sections so denuded and shall have the right to select a section or sections to an equal extent in lieu thereof from any unoccupied lands in such township

- 9) As townships are surveyed and the respective surveys thereof confirmed, or as townships or parts of townships are set apart and reserved from sale as timber lands the Governor of the said Company shall be duly notified thereof by the Minister of the Interior and thereupon this Act shall operate to pass the title in fee simple in the sections or three-quarter parts of sections to which the Company will be entitled under this clause, as aforesaid, and to vest the same in the said Company, without requiring a patent to issue for such lands, and as regards the lands set apart by allotment, and those selected to satisfy the one-twentieth in townships other than the above, as provided in sub-clauses five and six, returns thereof shall be made in due course by the Local Agent, or Agents, to the Dominion Lands Office, and patents shall issue for the same accordingly "

Mining and Mining Lands

- "42 Lands containing coal or other minerals, whether in surveyed or unsurveyed territory, shall not be subject to the provisions of this Act respecting sale or homestead entry, but shall be disposed of in such manner and on such terms and conditions as may, from time to time be fixed by the Governor in Council by regulations to be made in that behalf

"43 It is hereby declared that no grant from the Crown, of lands in freehold or for any less estate, has operated or will operate as a conveyance of the gold or silver mines thereon, unless the same are expressly conveyed in such grant.

- "44 Any discoverer of minerals upon surveyed or unsurveyed lands, or his assigns and associates, who had applied for a grant of such lands before the passing of the Act forty-third Victoria, chapter twenty-six, shall be held to have the same rights as if that Act had not been passed

Repeal

- "126 Subject to the provisions hereinafter made, the Act passed in the forty-second year of Her Majesty's reign and intitled 'An Act to amend and consolidate the several Acts respecting the Public Lands of the Dominions,' and the Act passed in the forty third year of Her Majesty's reign and intitled 'An Act to amend the Dominion Lands Act, 1879,' and the Act passed in the forty-fourth year of Her Majesty's reign,

and intitled 'An Act to amend the Dominion Lands Acts,' are hereby repealed and this Act is substituted for them: the Acts repealed by the Act first mentioned and for which it was substituted, remaining so repealed. Provided always, that all enactments repealed by any of the said Acts shall remain repealed and that all things lawfully done and all rights acquired and liabilities incurred under them or any of them shall remain valid and may be enforced and all proceedings and things lawfully commenced under them or any of them may be continued and completed, under this Act, which shall not be construed as a new law, but as a consolidation and continuation of the Acts hereby repealed subject to the amendments hereby made and incorporated with them, and any thing heretofore done under any provision in any of the said repealed Acts which is repeated without alteration in this Act may be alleged or referred to as having been done under the Act in which such provision was made, or under this Act."

By this time Parliament had not only repealed this section vesting the gold and silver in the patentee of any parcel of land, but it had declared that no grant from the Crown had operated as a conveyance of them unless expressly conveyed therein. It is submitted that this charge of policy could not, and did not affect the ownership of these minerals in the lands of the Company, and for the following reasons:

(a) The Company excepted and reserved these lands from those it surrendered.

(b) Such surrender was approved by the Order-in-Council of 1870, which had the force of a statute of the British Parliament.

(c) The transfer to Canada was made upon the terms and conditions in the Surrender, and Canada had no power to change them except and in so far as the Company could and did validly agree thereto.

(d) Such surrender was also approved by statute of the British Parliament. The British North America Act 1871, cap. 28, sec. 5.

(e) By special legislation and agreement with the Company, certain sections or parts of sections including therein the precious metals became vested in the Company. Subsequent general legislation did not in any way affect this or derogate from the Company's title.

(f) By section 1 "This Act applies exclusively to the public lands included in Manitoba and the several Territories of the Dominion." These lands had ceased to be public lands, and were in fact the Company's lands and known and designated as such.

(g) The Company did not receive any "grant from the Crown" within the meaning of section 43 for the land occupied as posts for the land adjoining the posts, or for its one-twentieth share. It accepted, retained and reserved all those lands from its surrender and

held them under it, and the relative legislation. The patents were merely confirmatory of the Company's title, or evidence of it. Certainly there never was any grant from the Crown as represented by Canada. The Surrender by the Company was to Her Majesty and the land excepted, retained and reserved therefrom remained vested in the Company. If any of it fell to the Company by way of regrant, it was not from the Crown in the right of Canada, as Canada had then no right or interest in the land, but direct from Her Majesty. Upon this Counsel cites **Calgary & Edmonton Ry. Co. v. The King**, 10 L.R. 1904 A.C. 765. The Company's title does not depend upon any grant or conveyance under the Act, and legislation as to the effect, meaning or operation of such conveyances is immaterial.

(h) Section 126 expressly enacts that "all things lawfully done, and all rights acquired" under any of the earlier Acts remain valid, and may be enforced.

LANDS EXCHANGED

As set out in clause 9 of the Case (p. 4, l. 36) the Company surrendered its right to these sections 8 and 26 and obtained other lands in lieu thereof, no reference being made to the precious metals. It is submitted that when the Company relinquished land including these minerals the land taken in exchange should also include them.

This also applies to land patented to the Company in lieu of land, including the precious metals, conveyed to the Crown.

PROVINCIAL ARGUMENTS

The provinces of Manitoba, Saskatchewan and Alberta, have the right to file factums, and to appear on the hearing. It is submitted that this argument as to the Company rights to these minerals applies to any claims they may advance.

MANITOBA

30 By the Manitoba Act, cap. 3, 1870, it was enacted by section 34,

"Nothing in this Act shall in any way prejudice or affect the rights or properties of the Hudson's Bay Company, as contained in the conditions under which that Company surrendered Rupert's Land to Her Majesty."

If the words of section 30 "all ungranted and waste lands" (Case p. 57, l. 6) should be held not to include the precious metals in such lands, they would in so far as the Company surrendered them, nevertheless be vested in Her Majesty under the Surrender or in Canada under the Order-in-Council. There does not appear to be any transfer of them to the Province, and the creation of the Province under section 1 did not in itself vest such property in it.

As already urged, the land of the Company did not come within the phrase "ungranted or waste lands" That only meant lands of the Crown, and section 30 refers to the land excepted in the Surrender

Manitoba, it is submitted, cannot claim the precious metals under sections 1 and 2 of The Manitoba Act, and section 109 of The British North America Act, as such minerals passed to the original Provinces under that section under the phrase 'lands, mines, minerals and royalties.' The Manitoba Act expressly retained in Canada the public lands and the royalties incident thereto, treating the precious metals as such, would not pass to the Province without express language.

By Cap 6 of 1877, An Act respecting the Boundaries of the Province of Manitoba, the Province was enlarged. There is in that statute no express provision as to the rights or powers of the Province in or over the added territory, but they would certainly not be more than those in the original area, and might be much less.

By Cap 14 of 1881 an Act to provide for the extension of the Boundaries of the Province of Manitoba they were further enlarged. Section 2 of that Act reads

20 "The terms and conditions upon which such increase is made are as follows

"(a) All the enactments and provisions of all the Acts of the Parliament of Canada which have, since the creation of the Province of Manitoba, been extended into and made to apply to the said Province shall extend and apply to the territory by this Act added thereto, as fully and effectually as if the same had originally formed part of the Province and the boundaries thereof had, in the first instance, been fixed and defined as is done by this Act, subject, however, to the provisions of section three of this Act."

30 By The Manitoba Boundaries Extension Act cap 32 of 1912, a further enlargement was made. Sections 5, 5 (2), 5 (3) 5 (8) and 6, are as follows

"5 Inasmuch as under the provisions of this Act the province will not have the public land as a source of revenue, there shall, subject to the provisions hereinafter set out, be paid by the Government to the province, by half-yearly payments in advance, on the first days of January and July in each year an annual sum based upon the population of the province, as from time to time ascertained by the quinquennial census thereof, as follows

40 "The population of the province being assumed to be on the first day of July, nineteen hundred and eight, over four hundred thousand the sum payable until such population reaches eight hundred thousand shall be five hundred and sixty-two thousand five hundred dollars,

"Thereafter until such population reaches one million two hundred thousand the sum payable shall be seven hundred and fifty thousand dollars.

"And thereafter the sum payable shall be one million one hundred and twenty-five thousand dollars.

10 "5. 2) Section 1 of Chapter 50 of the statutes of 1885 is repealed and all lands known as swamp lands transferred to the province under the said section 1 and not sold by the province prior to the time at which the terms and conditions of this Act have been agreed to by the Legislature of the province, shall be re-transferred to the Government.

20 "5. 3) The sums payable to the province under subsection 1 of this section shall be subject to a deduction at the rate of five per cent per annum upon the difference between the aggregate of the sums for which the said swamp lands were sold by the province and the aggregate of the sums from time to time charged to the province by the Government in connection with the selection, survey and transfer of such lands and of the sums expended by the province which may be fairly chargeable to the administration and sale of such swamp lands.

30 "5. 8) As an additional allowance in lieu of public land there shall be paid by the Government to the province one-half on the first day of July nineteen hundred and twelve and one-half on the first day of July nineteen hundred and thirteen, to assist in providing for the construction of necessary public buildings, two hundred and one thousand seven hundred and twenty three dollars and fifty seven cents a sum equal to the difference between the total payments made by the Government to each of the provinces of Saskatchewan and Alberta, under The Saskatchewan Act and The Alberta Act respectively for the like purposes and the sums already paid by the Government on account of the construction of the Legislative Buildings and the Government House at Winnipeg.

40 "6 All Crown lands, mines and minerals and royalties incident thereto in the territory added to the province under the provisions of this Act and the interest of the Crown under The Irrigation Act in the waters within such territory shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act."

Reference may also be made to the following Statutes

(a) Cap 5 of 1882. The recital sets forth the fact that its *public lands* are administered and the *proceeds* appropriated by the Dominion Government."

(b) Cap 50 of 1885, 'An Act for the final settlement of the claims made by the Province of Manitoba on the Dominion.' Section 5 refers to Manitoba's "want of public lands."

(c) Cap 8 of 1886, An Act to explain the last Act.

(d) Cap. 38 of 1886 (Man.) By this Manitoba accepted the grants and payments under the above two Acts 'as a full settlement of all claims by the said Province upon the Dominion as therein set forth "

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- 10 Extracts from the Statutes creating these provinces appear in the Case, p. 58. Counsel refers to sections 20, 21 and 23 of each Act.

QUESTIONS REFERRED

Upon questions 1 to 6 the Company submits that the precious metals covered by these questions were at the respective times vested in the Company because it had received an express grant of them from the Crown, and did not by the surrender divest itself of them. While the Surrender conveyed to the Crown the "land granted" by the letters patent, it does not contain apt or appropriate words to convey the "mines royal as well discovered as not discovered, of gold, silver, 20 gems and precious stones" granted by the letters patent.

The Company submits the following alternative reasons in support of its contention upon each question.

AS TO QUESTION 1

1. The Company surrendered the land granted to it only upon the conditions in the deed and by clause 2 of such conditions it "retained" these lands, including the precious metals therein, which were then vested in it.

2. The Company excepted these lands, including the precious metals, out of the lands surrendered.

30 AS TO QUESTION 2(a)

1. The Company surrendered the land upon the conditions in the deed and under clauses 2, 3, 4 and 8 thereof these blocks of land with the precious metals did not pass from it. Upon their survey and selection the boundaries were determined.

2. The Company excepted these lands, including the precious metals, out of the lands surrendered. The Company's title was good immediately upon selection.

AS TO QUESTION 2(b)

The patents confirmed in the Company its previous statutory 40 and parliamentary title and were evidence of title. If it should be

held that the precious metals were not vested in the Company prior to the issue of patents they would become vested in it thereupon under the terms of section 36 of the Dominion Lands Act, 1872.

AS TO QUESTION 3

Under the surrender the Company excepted one-twentieth of the land in the fertile belt, and such included all the estate and interest and incidents belonging thereto then vested in the Company. The change effected by the agreement between Canada and the Company in 1872 did not affect the extent of the Company's interest in the land.
 10 There is no suggestion that the Company intended to release or did release anything it had under the Surrender in this respect.

Further, even if there were any doubt as to its rights to the gold and silver in these lands under the Surrender such doubt was dissolved by the contract between the Crown and the Company under which the Company had confirmed its title to them. On notification of the survey of each township these minerals therefore were vested in the Company, not in the Dominion.

AS TO QUESTIONS 4(a) AND 4(b)

The Company's estate in these lands was not any different from
 20 that in those covered by notification. The patents, read and interpreted with the Dominion Lands Act of 1872, vest in the Company these precious metals.

AS TO QUESTIONS 5 AND 6

Had the Company ~~not~~ relinquished its rights in or conveyed these lands, the precious metals therein would vest in it. The accepting of other lands in lieu of them did not affect this ownership.

AS TO QUESTION 7

For the reasons already set forth, it is submitted that these repealing or amending Acts did not affect the ownership of the minerals
 30 in question.

All of the above is respectfully submitted.

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Winnipeg,
 January, 1927.

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